IN THE

Supreme Court of the United States

OCTOBER TERM, 1946.

No. 877

petition not printed

THE PEOPLE OF THE STATE OF NEW YORK, *ex rel.* JAMES MORRISON,

Petitioner-Appellant,

against

JOHN F. FOSTER, as Warden of Auburn Prison at Auburn, New York,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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To the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Comes now the respondent in the above entitled cause by the Attorney General of the State of New York, and opposes the petition herein and asks that it be denied.

Statement of the Case

The petitioner prays for a writ of certiorari to review two orders of the Court of Appeals of the State of New

York entered respectively on the 17th day of October, 1946 and on the 21st day of November, 1946 in a proceeding upon a writ of habeas corpus. The order of the Court of Appeals filed October 17, 1946 unanimously dismissed an appeal taken by the petitioner from an order of the Appellate Division, Fourth Department of the Supreme Court of New York, entered May 28, 1946 which affirmed, *per curiam* the order of the Supreme Court, Cayuga County, dated February 7, 1946 dismissing the writ and remanding the petitioner. The order of the Court of Appeals filed November 21, 1946 unanimously denied petitioner's motion to amend the remittitur of the Court of Appeals, dated October 17, 1946.

No opinion was rendered by any of the courts, the Court of Appeals deciding merely that the appeal should be dismissed on the ground "that no constitutional question is directly involved" (296 N. Y. 655).

The Facts

Petitioner was indicted by the Grand Jury of Richmond County by indictment filed May 28, 1941 (fol. 67),* which contained five counts and in its original form charged John Doe, also known as James Corbett and three other persons known as John Doe, with having committed the crime of robbery in the first degree, grand larceny first degree, violation of Penal Law, Section 1897, grand larceny first degree in a second form, violation of Penal Law, Section 1308 (fols. 73-86).

Morrison was arrested May 28, 1941 and subsequently arraigned before the Richmond County Court (fols. 55-59), which on June 24, 1941, on motion of the District Attorney,

* Folio references are to the record in the New York Court of Appeals.

amended the indictment to substitute Morrison in place of one John Doe. Morrison waived the reading of the indictment and entered a plea of not guilty, being represented by counsel (fols. 67-69).

No motion or demurrer was offered against the indictment, and after trial the jury on November 25, 1941 found the defendant guilty of robbery first degree, grand larceny first degree, and violation of Penal Law, Section 1897 (fols. 69-70).

On February 27, 1942, an information having been filed against the defendant charging prior felonies, he was sentenced to a term of from thirty to sixty years (fols. 25-30). Morrison appealed from the judgment of conviction, and the judgment was affirmed *(People* v. *Morrison,* (1942) 264 App. Div. 778; Decision amended (1942) 264 App. Div. 789).

Three years later a motion made by Morrison to vacate the order entered upon the Appellate Division's decision was denied *(People* v. *Morrison,* (1945) 269 App. Div. 784).

The Issue

Morrison asserts that the original indictment, having been found against one John Doe, a fictitious name, could not be amended to charge him with the offenses alleged, and that such amendment deprived him of certain constitutional rights in violation of the Constitutions of the United States and the State of New York. He relies particularly upon the Fourteenth Amendment to the Federal Constitution and Article I, Sections 6 and 11, of the New York Constitution.

POINT I

Petitioner has not been denied due process of law in violation of the Fourteenth Amendment.

Petitioner's argument that he has been denied due process of law rests upon his prior contention that he was not proceeded against by a valid indictment, the petitioner claiming that there was a defect in the form of the indictment. Aside from the fact that there actually was no such defect in the indictment, and the courts below so found, petitioner's reliance upon the Fourteenth Amendment as a guarantee of prosecution by indictment is without merit, for although the Fourteenth Amendment does guarantee due process, it does not require any particular form of due process, nor does it require that a defendant be proceeded against by indictment (*Hurtado* v. *California,* 110 U. S. 516 [1884]; *Maxwell* v. *Dow,* 176 U. S. 581 [1900]; *Lem Woon* v. *Oregon,* 229 U. S. 586 [1913]).

The requirement of due process is satisfied when the accused has been apprised of the charges against him and has been given a fair opportunity to be heard in a court of competent jurisdiction according to established modes of procedure (*Frank* v. *Mangum,* 237 U. S. 309, 326 [1914], and cases cited therein). In the case at bar, the petitioner was advised of the charges against him, expressly waived a reading of the indictment, and pleaded not guilty thereto (fol. 69). He was represented by counsel (fol. 67), was accorded a jury trial, and was found guilty (fols. 69-70). Thus, every requirement of due process was satisfied.

It should be noted in passing that although petitioner does not now rely on the Fifth Amendment to the United States Constitution, he did so at the hearing on his writ of habeas corpus. However, that fact does not warrant further consideration here, as it is fundamental that the Fifth

Amendment has no application to the individual states (*Barron* v. *Baltimore*, 7 Pet. 243 [1883]; *Twining* v. *New Jersey*, 211 U. S. 78 [1908]; *Palko* v. *Connecticut*, 302 U. S. 319, 322 [1937]; *Feldman* v. *United States*, 322 U. S. 487, 490 [1943]).

POINT II

This Court is without jurisdiction to determine whether there has been a violation of the New York State Constitution.

The jurisdiction of this Court with regard to the construction of state constitutions was declared in the case of *Post* v. *Supervisors*, 105 U. S. 667, 668 (1881), where this Court held that "The construction uniformly given the Constitution of a State by its highest court is binding on the courts of the United States as a rule of decision." And again in *Rawlins* v. *Georgia*, 201 U. S. 638, 639-40 (1906), Mr. Justice Holmes pointed out that "If the state constitution and the laws as construed by the state court are consistent with the Fourteenth Amendment, we can go no further." (See also *Sterling* v. *Constantin*, 287 U. S. 378, 396 [1932]; *Town of South Ottawa* v. *Perkins*, 94 U. S. 260, 268 [1876]).

In point 3 of the "statement on jurisdiction to review" in his petition for a writ of certiorari (p. 13), petitioner claims that his conviction violated the provisions of Article I, Sections 6 and 11, of the New York State Constitution, and he seeks a review thereof by this Court. Article I, Section 6, guarantees prosecution by indictment for infamous crimes and Article I, Section 11, guarantees equal protection of the laws and protection against discrimination in civil rights. The New York courts specifically passed upon these contentions of petitioner and held that no right of petitioner under the State Constitution had been violated.

This holding was in accord with the established rule in New York that a John Doe indictment may be amended prior to trial to identify the defendant (*People* v. *Bogdanoff*, 254 N. Y. 16, 23; *People* v. *Johnson*, 104 N. Y. 213, 216-17; *People* v. *Farson*, 244 N. Y. 413; *People* v. *Cook*, 197 App. Div. 155, 163).

In view of the construction given to the State Constitution in this case by the highest State court, this Court is without jurisdiction to consider the issues raised by petitioner with regard to the New York State Constitution.

POINT III

Certiorari should not be issued to review the proceedings in the State Courts upon a writ of habeas corpus, which is a collateral attack upon the judgment of conviction.

As we have seen above, amendment of an indictment to properly identify the defendant has been held upon direct appeal not to violate any requirements of due process or any constitutional provisions.

By this application the petitioner seeks to review the dismissal of a writ of habeas corpus, the petition for which alleged as its only ground that in the proceedings of the trial court which lead to petitioner's conviction, petitioner had been deprived of due process or other constitutional rights by the fact that the indictment was amended by the trial court to properly identify him. This contention was disputed and resolved against the petitioner.

The appropriate remedy for such a deprivation of constitutional rights, if such it was, is appeal from the judgment of conviction, a remedy of which the petitioner has already availed himself without success.

Even after the time limited for appeal has expired, the courts of New York provide an adequate remedy in the

nature of a writ *coram nobis* upon application to the court of original jurisdiction to open and review its proceedings upon the trial for errors constituting denial of due process of law *(Matter of Lyons* v. *Goldstein,* 290 N. Y. 19). This Court has recognized the right of the New York courts to determine whether habeas corpus is an appropriate remedy. *(New York ex rel. Whitman* v. *Wilson,* 318 U. S. 688.)

The entire practice and jurisprudence of the State of New York concerning habeas corpus and its availability to correct errors, irregularities and injustices occurring upon the trial is reviewed and summed up in an opinion of the Court of Appeals of the State of New York *(Morhous* v. *Supreme Court,* 293 N. Y. 131).

CONCLUSION

It is thought that this cause presents no question warranting review by this Court, and that the petition should be denied.

Dated: January 27, 1947.

Respectfully submitted,

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